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Supreme Court of the United States

OCTOBER TERM, 1959

No. 545

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL.,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILROAD CO., ET AL.,
Respondents.

REPLY FOR PETITIONERS

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INTRODUCTORY STATEMENT

A Court of Appeals renders a judgment deciding legal questions of substance in a litigant's favor and directs the district court to take further action in accordance with its mandate (Pet. App. A). In a subsequent case between different parties another panel of that Court modifies the holding in the first case (Pet. App. D). The district court then refuses to follow the mandate in the first case; instead, it specifically follows the holding in the second case (Pet. App. F, pp. 57-58). Thereafter, the Court of Appeals denies the litigant's motion for recall and clarification of the mandate or alternative relief in the nature of mandamus (Pet. App. H), leaving the district court's order (Pet.

App. G) unchanged. Has the Court of Appeals thereby worked a revision or amendment of its original judgment so as to subject the original judgment, as thus amended, to the certiorari jurisdiction of this Court? We think this question must be answered "YES." Otherwise, the litigant would be deprived of his opportunity to invoke this Court's certiorari jurisdiction. Since the original determination was favorable to him, he *would* not seek review. And because the subsequent adverse determination was made in a case in which he was not a party, he *could* not obtain review.

Having successfully argued in the court below that the plain and unambiguous effect of the Court of Appeals' order of September 23, 1959 was to work a substantial revision of the prior opinion and judgment (see Pet. 13, fn. 7), respondents now urge that "it would be far more accurate to say" that the Court of Appeals' order did no more than deny review of an unappealable interlocutory order of the district court (Res. Br., 10-11). Plainly, respondents' about-face is an attempt to avoid a consideration by this Court of Questions 2 and 3 of the Questions Presented.[1] For the reasons set forth in the Petition for Certiorari, pp. 11-14, we submit that a petition for a writ of certiorari to review the prior judgment (Pet. App. A) as amended September 23, 1959 (Pet. App. H), is one which is "timely filed."

[1] Obviously respondents were compelled to take this position because (1) the Court of Appeals decided Question 2 in a way in direct conflict with this Court's recent decisions in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 and *United States* v. *Radio Corporation of America*, 358 U.S. 334 [both decided subsequent to the original determination below] (Pet. 22-23), and (2) this Court recently granted certiorari to review the procedural question presented by *Pennsylvania R. Co.* v. *United States*, No. 151, October Term, 1959, thereby emphasizing the fundamental importance of Question 3 which includes, among other things, the same problem (Pet. 20-22).

Respondents also attempt to create nonexistent fact issues in order to persuade the Court that the legal questions presented are not ripe for determination. The court below held all these relevant material facts to be undisputed (Pet. App. A, pp. 32-33). And in its present procedural posture this case is no more or less final and at no more or less an intermediate stage than were *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, and *Davidson Transfer & Storage Co.* v. *United States*, *ibid.*, when certiorari was granted in those cases. Certainly, it is more final and at less an intermediate stage than was *Southwestern Sugar & Molasses Co.* v. *River Terminals Co.*, 360 U.S. 411, when certiorari was granted in that case.

But respondents strenuously urge that the Court of Appeals' September 23, 1959 order was not a substantial amendment of the original judgment entered February 25, 1958 (Res. Br., 10-11). Assuming, without conceding, the correctness of respondents' view, we will nevertheless show that there are "special and important" reasons why this Court should grant certiorari to review Questions 1, 4 and 5 of the Questions Presented *at this time*.

I

Respondents urge that Question 1 of the Questions Presented (Pet., 15-18) should not be reviewed by the Court at this time because where "the intent and effect of rate activities claimed to be covered by approved section 5a agreements is the sole or dominant issue in an alleged antitrust conspiracy, it is not only proper but essential that the matter be referred to the Interstate Commerce Commission for appropriate initial consideration" (Res. Br., 17). In support of this position respondents argue (1) that in the light of this Court's holding in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, the ICC must first marshal the relevant transportation

facts (Res. Br. 13-15), and (2) that Congress, by enacting the National Transportation Policy, vested the ICC with the power to resolve inter-industry controversies over competitive transportation services (Res. Br., 15-16). The misapplication of this Court's holding in *Isbrandtsen* is discussed in the Petition for Certiorari, pp. 15-18, and need not be repeated here. Respondents' misplaced reliance on the National Transportation Policy is easily demonstrated.

Respondents argue that in enacting the Reed-Bulwinkle Act Congress was faced with the problem of reconciling the principles embodied in the antitrust laws with the principles embodied in the National Transportation Policy (Res. Br., 16-17). This is correct. But an argument that Congress reconciled these principles in the case of section 22 rates by directing that both be ignored is little short of ludicrous. Apart from the reasons set forth at page 17 of the Petition for Certiorari, the National Transportation Policy has no application to section 22 rates because the ICC has no regulatory jurisdiction. *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 543 ftn. 10, 547. Yet, respondents urge that the antitrust laws do not apply because of their asserted 5a immunity. Such a contention requires the Court to assume, with no basis in the legislative history, that Congress intended an entirely irrational result—that of creating a "no man's land" in which neither of these important policies was to be operative. Furthermore, it is apparent on its face that the National Transportation Policy has no application in the case of rail-air carrier competition. Dearing and Owen, *National Transportation Policy*, 171-184 (1949). The authors there point out:

> "So far as declared policy is concerned, we . . . . have a head-on conflict between the Interstate Commerce Act and the Civil Aeronautics Act. One program considers the railroads, highways, domestic waterways, and pipelines as fit subjects for unified treatment. The competitive price and service practices

> of these agencies are to be made responsive to high standards of performance, encompassing nondiscriminatory treatment of public patrons and economic standards of interagency competition. Moreover, the Interstate Commerce Act embodies the explicit proposition that these agencies should somehow be welded into an integrated and efficiently functioning national transportation system. In sharp contrast, the other line of government action assumes that the movement of goods and people by air carriers produces economic, social, and national security values which are superior to, or at least different from, the values produced by other forms of transportation in the performance of identical services." *Id.*, at pp. 180-181.

Assuming, *arguendo*, that the Court of Appeals' September 23, 1959 order (Pet. App. H) was not a substantial amendment of the original determination below (Pet. App. A), this Court should nevertheless grant certiorari to review Question 1 *at this time*. See *United States Alkali Export Association* v. *United States*, 325 U.S. 196, 203-204.

II

Respondents contend that Question 4 of the Questions Presented (Pet. 23-25) should not be reviewed by the Court at this time because a full factual determination by the ICC as to what respondents' "rate practices were and the competitive setting in which they occurred" is a prerequisite before the courts can determine whether agreements encompassing such practices may legally be approved by the ICC under section 5a(2) of the Interstate Commerce Act (Res. Br., 17-21). Underlying this argument is the assertion that the courts below, in accordance with *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, were properly availing themselves "of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Id.*, at p. 498. Since, however, the facts essential to a determination of the question of "coverage

by statute" are "undisputed," respondents' argument that it "is plainly not possible to determine whether certain rate practices were 'rates, fares . . . or charges' * * * until there has been a factual determination of what those rate practices were and the competitive setting in which they occurred" (Res. Br., 20) is self-defeating. The "aid implicit in the agency's superiority in gathering the relevant facts and marshaling them into a meaningful pattern," *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498, is not needed here because all the relevant undisputed facts have already been gathered and marshaled into a meaningful pattern both by the Court of Appeals in its original determination (Pet. App. A, pp. 32-33, 45-47)[2]

[2] The Court of Appeals found the "essential undisputed facts" with respect to these practices as follows: (1) Variable spot bids—Joint agent bids at variable rates within an established range as low as 50% below regular tariffs. The agent acts for both competing and connecting roads (Pet. App. A, pp. 32, 45); (2) Package bids—Single fixed bids for movements from one starting point to a number of different destinations. Such bids are submitted on an all-or-nothing basis. The air carriers are unable to participate in portions of these movements because of the short distance, lack of airfields, or numerical size of some segments. Package bids are accompanied by a condition that the Government must give certain specified traffic to the railroads which otherwise might go to the airlines (Pet. App. A, pp. 32, 45-46); (3) "The practices constitute a system of price-fixing in concert by competing, nonconnecting carriers. We are unable in law to distinguish such concerted fixing of charges and conditions for transportation from price-fixing of commodities, * * * and we emphasize that the practices enjoined are not those of connecting carriers for through transportation, but those which result from concert between competing and nonconnecting carriers. These carriers agree among themselves, through their joint agent, on a charge within a certain range" (Pet. App. A, pp. 44-45); (4) "If the quantity of traffic were material, we think there could be no doubt that it is so substantial, and the railroad's control of it so great, that the antitrust decisions referred to have application" (Pet. App. A, p. 46, fn. 25); and to leave no doubt as to what was found on the record, and what was still

and by the ICC in *All American Airways, Inc.* v. *Abilene & Southern Ry. Co.*, 297 ICC 313, 316-318 (1955). Cf. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 69.

Where a case is remanded by an appellate court for further proceedings "not inconsistent with its opinion" the "opinion" is a part of the mandate and every question of fact or law before that court and decided by its opinion is conclusively settled for the lower court in all further proceedings in the litigation. *N.A.A.C.P.* v. *Alabama*, 360 U.S. 240, 244-245; *Gaines* v. *Caldwell*, 148 U. . 228, 239-241. This rule is in no way altered where, in reversing an order granting a motion for summary judgment, a particular issue is raised and argued in the appellate court and is passed upon. *F.A.R. Liquidating Corp.* v. *Brownell* (3 Cir.), 223 F. 2d 128.[3] Thus, when respondents argue that

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open to dispute on remand to the district court, the Court of Appeals stated:

> "In the District Court allegations and verified statements were made on behalf of Aircoach to the effect that the practices enjoined were in purpose employed by Railroads to eliminate the competition of Aircoach. Notwithstanding this, both Aircoach and Railroads moved for summary judgment. In the circumstances we construe each motion as a claim by the movant that it was entitled to judgment as matter of law on those facts which were undisputed. The motion of Railroads is not to be construed as admitting factual allegations in regard to a purpose to destroy competition which would have the legal result of removing Railroads from any possible protection from the anti-trust laws; nor can Aircoach's motion be construed as abandoning those allegations. *Thus, on this aspect of the case, there remains a factual dispute.*" (Pet. App. A, pp. 46-47, emphasis supplied.)

[3] Similarly, where an issue is raised and argued in the appellate court and is passed upon, a defendant cannot again raise that issue in his answer, even where it was never pleaded as a defense. *H. P. Coffee Co.* v. *Reid, Murdoch & Co.* (8 Cir.), 60 F. 2d 387, 389; *In re N. V., etc. of Rotterdam* (5 Cir.), 64 F. 2d 915, 916; *Mortgage Loan Co.* v. *Livingston* (8 Cir.), 66 F. 2d 636, 638-640, cert. den. 290 U.S. 685; *Britton* v. *Dowell* (10 Cir.), 243 F. 2d 434.

the Court of Appeals' holding (*i.e.*, that the applicability of section 5a to section 22 rates might vary depending upon the particular type of section 22 rate activity involved) "brought into issue new questions of transportation law and fact which had not been contemplated by the motion for summary judgment and supporting affidavits then before the court" (Res. Br. 6), this assertion is belied by their own words. For, in answer to petitioners' argument below that, even if concerted action in making *uniform* section 22 rates (*e.g.*, first class fare less 10%) was validly immunized, respondents' "'variable' section 22 quotation and 'package' bidding practices were *per se* illegal, or were otherwise in violation of the antitrust laws on the basis of the undisputed facts of record,"[4] respondents stated:

> * * * every aspect of defendants' rate practices now singled out for attack by plaintiffs (the variable rates, the so-called 'range' within which the rates were made, and the so-called package rates) were all the subject of attack before the Commission in the *All American Airways* proceeding brought under Section 5a(7). The Commission expressly recognized that in reciting the issues before it (297 I.C.C. at 316): 'The railroads, through the chairman of their respective passenger associations or committees, make a bid or response to every cost request submitted by the military, either by offering the standard 10-percent discount provided by JMPA, or, since late in 1953, for 18 or more military personnel traveling in a group, with special trains provided for 190 or more, by making a *special bid*, as low as *2.3* cents per passenger-mile in the West and *2.1* in the East, *sometimes on a package basis* for movements with a common date and origin and reflecting *in some instances* a discount of as much as 50 percent under the commercial fares." (Emphasis supplied.) We may properly add that plaintiffs could in no event deprive the defendants of a full trial on questions of purpose, reasonableness of defendants' practices in the light of all the circumstances, and the

[4] Appellees' Supplemental Memorandum filed with the Court of Appeals on January 13, 1958, pp. 15-22.

nature of plaintiffs' competition which defendants were meeting in good faith—even assuming, contrary to our position here, that such issues are justiciable in this proceeding without prior resort to the Commission * * * In addition it should be noted that defendants made the following showing in the proceeding before the Commission in the *All American Airways* case (and would be prepared to make such a showing in any further trial of these matters): that the variable rates are requested by the Department of Defense in response to cost requests covering individual movements of military personnel and are necessary if defendants are to compete with plaintiffs for this traffic; that the 'range' setting a floor below which special Section 22 rates will not be made is a practice which benefits and cannot injure plaintiffs since such a floor guards against rates made below the cost of service; and that the practices of package bidding was instituted by the non-scheduled airlines themselves and is, in any event, essential in providing special train services in response to cost requests covering volume movements. See, e.g., 297 ICC at 318 and some portions of the testimony before the Commission at J.A. 118-171. The *All American Airways* case shows that the validity of these rate practices can be and in fact has been litigated before the Commission."[5]

The foregoing demonstrates what respondents represented to the Court of Appeals as being the only issues of fact remaining in this case and the court decided it on that basis. Respondents had a full opportunity, of which they took every advantage, to show by affidavit and other pleadings the issues which were raised, and at no point prior to the Court of Appeals' original decision did they assert that they had not engaged in these practices or dispute petitioners' claims regarding their nature.[6] In fact, the

[5] Reply Memorandum for Appellants filed with the Court of Appeals on January 16, 1958, pp. 6-8.

[6] Respondents' assertion that the Court of Appeals' explicit findings as to the precise nature of the challenged rate practices was a statement obviously made only for the purposes of that sum-

Court of Appeals acted upon a record in which both sides gave non-conflicting descriptions of the variable "spot" and "package" bidding practices at issue here. Compare J.A. 42-48 with J.A. 86-89, J.A. 118-150 and J.A. 169-170. Respondents did raise questions of fact as to their motive or intent, whether the practices resulted in below-cost quotations, and whether petitioners' damages were caused by respondents or by some independent causation. But as to the nature of the practices themselves—there was no dispute. Nor could there have been, for these very practices had been the subject of extensive testimony and documentation in *All American Airways, Inc.* v. *Abilene & Southern Ry. Co.*, 297 ICC 313 (1955), and the record and findings in that proceeding were the factual base relied on by both sides in the litigation. Respondents have raised these alleged fact issues solely to create the erroneous impression that this case is not ripe for determination at this time. The attempt comes much too late. In *N.A.A.C.P.* v. *Alabama*, 360 U.S. 240, this Court recently had occasion to reiterate the familiar rule that whatever was before the appellate court, and was disposed of, is considered as finally settled. *Id.*, at pp. 244-245.[7]

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mary judgment appeal" (Res. Br., 20 ftn. 9) is patently spurious. *F.A.R. Liquidating Corp.* v. *Brownell* (D.C., Del.), 130 F. Supp. 691, 694-695, motion to recall mandate denied (3 Cir.), 223 F. 2d 128. Moreover, as their own memorandum of January 16, 1958 in the court below quite clearly shows, both *Griffin* v. *Griffin*, 327 U.S. 220 and *Helms* v. *Duckworth* (C.A.D.C.), 249 F. 2d 482 are inapposite. Furthermore, if in fact the Court of Appeals rejected our argument as respondents now urge, how can they argue in the very same brief that the Court of Appeals' order of September 23, 1959 (Pet. App. H) was not a substantial amendment of the original opinion and judgment (Pet. App. A)?

[7] Respondents lean heavily on a reference in the district court's opinion (Pet. App. F) to the *issues of fact* stated in the ICC's order (Res. Br., 19). As shown from the ICC's order itself, these issues are (1) "whether the challenged rate practices are, in fact, covered by one or more of the section 5a agreements which have been previously approved by [the ICC]," and (2) "a determina-

Nevertheless, respondents assert that the question which petitioners sought to have decided forthwith by the courts below "quite plainly involves a technical transportation question under section 5a(2) of the Interstate Commerce Act and one which is quite different from the ultimate 5a(9) question which the Commission disclaimed" (Res. Br., 19). First of all, the ICC's order makes it clear that it was disclaiming the precise legal question set forth in the Court of Appeals' opinion (Pet. App. C, p. 50), so an argument that the ICC intended to vary the nature of that question is spurious. Secondly, since the facts on the first branch of this case are no longer open to dispute, an ICC determination "in aid of the Court" (Pet. App. C, p. 51), would have to be made on the undisputed facts, and not on some new ones which respondents might think up. Nor can respondents be serious when they urge that "the question sought to be decided forthwith by the Court plainly involves a technical transportation question under section 5a(2) of the Interstate Commerce Act." In the words of Mr. Justice Brandeis, "[h]ere no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the [statute] which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U.S. 285, 294.

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tion of whether the procedures contained in said agreements were adhered to * * * " (Pet. App. C, p. 50). The first is a fact question the ICC can decide merely by examining the 5a agreements in its files; it involves no expertise whatever. The second was conceded by petitioners in the court below and is no longer in the case.

For the reasons set forth at pp. 23-25 of the Petition for Certiorari the refusal of the courts below to determine whether, in view of the undisputed facts, agreements encompassing respondents' challenged rate practices may legally be approved by the ICC under section 5a(2) of the Interstate Commerce Act, was in direct violation of this Court's holdings in *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 414-415, and *United States v. Radio Corporation of America*, 358 U.S. 334. Moreover, in the light of this Court's action of December 14, 1959, granting certiorari in *Pennsylvania R. Co. v. United States*, No. 451, October Term, 1959, review at this time becomes essential. If the petitioner in that case is successful in sustaining its position before this Court and certiorari is denied on Question 4 of the Questions Presented in this case, an advisory determination by the ICC (Pet. App. H) in aid of the district court's jurisdiction under the antitrust laws (Pet. App. C, p. 51) will be converted into a conclusive determination depriving the district court of any effective antitrust jurisdiction, including its power under the mandate of the court below to "*proceed according to its own light* to interpret * * * the agreements" (Pet. App. A, p. 44; emphasis supplied).

III

Assuming, *arguendo*, that the Court of Appeals' September 23, 1959 order (Pet. App. H) was not an amendment or revision of the original judgment entered February 25, 1958 (Pet. App. A), it is immediately apparent that the Court of Appeals has so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision. The September 23, 1959 order below (Pet. App. H) sanctioned a departure by the district court from the long settled "strict mandate" rule and a consequent breakdown in orderly

judicial administration.[5] The district court's order of March 2, 1959 (Pet. App. G) was no mere technical violation of the Court of Appeals' mandate. It referred to the ICC issues which the Court of Appeals said should not be referred, and having expanded the reference, it then refused to decide a question of law which would have completely disposed of the litigation.

Petitioners did not seek certiorari from the original determination (Pet. App. A) because, on the whole, that decision was favorable to them. Yet, after their time to petition for certiorari from that determination had expired, another panel of that court in *Atlantic Coast Line R. Co. v. Riss & Co. Inc.* (C.A.D.C.), 267 F. 2d 657 held that one of the most favorable portions of the original holding had been adversely "modified" against them. Petitioners could not seek certiorari from the "modifying" decision in *Riss* because they were not parties to it. *In re Leaf Tobacco Board, etc.*, 222 U.S. 578. Thus, by permitting the district court's order of March 2, 1959 to stand, the Court of Appeals effectively deprived petitioners of an opportunity to seek review from this Court through the simple device of "modifying" the original holding in a case in which petitioners were not parties. In these circumstances, the action of the court below was inconsistent with basic fairness and a violation of "due process". It obliterated petitioners' right to invoke the certiorari jurisdiction of this Court. To say that the result did not comport with orderly judicial administration is, in our

[5] In *Gaines v. Caldwell*, 148 U.S. 228, this Court held that, although a subsequent decision might have caused a different result, it could not "on well established rules and principles permit the circuit court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present [case]." *Id.*, at p. 244. This has always been the law. *In re Potts*, 166 U.S. 263, 267-268; *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 91; *National Brake Co. v. Christensen*, 254 U.S. 425, 430-431; *Southard v. Russell*, 16 How. 547, 570-571.

view, an understatement. Cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580; *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U.S. 464, 476; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678, 681.

Respondents impliedly concede that the action of the Court of Appeals was an abuse of discretion (Res. Br., 11). Nevertheless, they urge that the instant petition is the practical equivalent of a petition for certiorari to the district court under 28 U.S.C. § 1651(a) (Res. Br., 10-11).[9] In *United States* v. *United States District Court*, 334 U.S. 258, the government petitioned for a writ of certiorari to review a denial of mandamus by the Court of Appeals. At the same time, it petitioned this Court for leave to file a petition for mandamus under the All Writs Statute. The writ of certiorari was granted. The petition for

[9] The district court's order of March 2, 1959 (Pet. App. 6) was an interlocutory one. It was also in direct violation of the Court of Appeals' mandate. And respondents are correct when they state that petitioners sought "to have it reviewed by the Court of Appeals by the device of a 'motion for recall and clarification of mandate' and asked in the alternative that this motion be treated as a petition for mandamus or certiorari to the District Court under the All Writs Statute. 62 Stat. 944, 28 U.S.C. § 1651 (a)" (Res. Br., 10). Historically, mandamus has always been available to control an interlocutory order of a lower federal court whenever it has refused to give effect to or has misconstrued the appellate court's mandate. *B. & O. R. Co.* v. *United States*, 279 U.S. 781, 785; Vol. 6, *Moore's Federal Practice* [2d Ed.], p. 70. And since 1948, a motion to recall and clarify the mandate has been used to accomplish a similar result where supervening events indicate that amendment of the mandate rather than mandamus is the more appropriate remedy. See, *e.g.*, the sharply parallel case of *Bernstein* v. *N.V. Nederlandsche, etc.* (D.C., SDNY), 117 F. Supp. 898, 902-903, mandamus den., *sub. nom. Chemical Bank & Trust Co.* v. *Dimock* (2 Cir.), 210 F. 2d 376, mandate amended, *Bernstein* v. *N. V. Nederlandsche, etc.* (2 Cir.), 210 F. 2d 375, in which the Court of Appeals, confronted simultaneously with a motion to recall its mandate and a petition for mandamus, chose to recall its mandate.

mandamus was "held" pending decision on certiorari and, after a decision reversing the Court of Appeals, this Court denied the motion for leave to file the petition for mandamus. See *United States* v. *United States District Court*, 334 U.S. 834. Similarly, in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, this Court granted a petition for a writ of certiorari to review a denial by the Court of Appeals of a writ of mandamus directed to a district judge. Accordingly, respondents' argument that "in substance this petition for certiorari is no more than an effort to obtain a review in this Court of an unappealable interlocutory orders of the District Court following failure to obtain such review from the Court of Appeals * * * and for all practical purposes [is] the equivalent of a petition for certiorari to the District Court under the All Writs Statute" (Res. Br. 10-11) is frivolous.

Interlocutory or final, intermediate or otherwise, this Court will grant certiorari to review an order of the Court of Appeals whenever it believes that the action below constituted so far a departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision. *E.g.*, *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U.S. 372, 384; *Beacon Theatres, Inc.* v. *Westover*, *supra*. Where the deviation results in a whittling away of this Court's certiorari jurisdiction, the need for supervision is clear. A writ of certiorari to review Question 5 of the Questions Presented should therefore be granted at this time. Cf. *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 689.

CONCLUSION

We submit that the Court of Appeals' action on September 23, 1959 (Pet. App. B) constituted a substantial amendment of the original determination below (Pet. App. A) and that all the Questions Presented are now ripe for

review by this Court. If we are wrong in this view, it is nevertheless clear that Questions 1, 4 and 5 of the Questions Presented should be decided now. Once the FCC has concluded hearings in the administrative proceeding—a proceeding which is wholly academic at this time—it will be too late to review the issues presented by these questions. At that point they will have been mooted.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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